

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)	
)	
Opinion requested by:)	No. 76-082
R. J. Maloney,)	Aug. 18, 1977
District Attorney,)	
County of Glenn)	
)	

BY THE COMMISSION: We have been asked the following questions by R. J. Maloney, the Glenn County District Attorney:

Glenn County does not employ a full-time surveyor or engineer. Instead, it contracts with a local engineer and surveyor to provide these services on a part-time basis. This person performs the duties of the county engineer pursuant to a one-year contract which has been renewed on a continuous basis since 1965. The same person serves as county surveyor by virtue of an appointment by the Board of Supervisors. In addition to his official duties, the county surveyor-engineer is the owner of a private engineering and surveying firm in Glenn County.

There are two other licensed practicing engineers and three other licensed practicing surveyors in business in Glenn County. Together these engineers and surveyors perform about 95% of the engineering and survey work done in the county. Prior to adopting a policy of turning down any private work that could possibly create a conflict of interest, the person serving as county surveyor-engineer did about 30 to 40 percent of the engineering and surveying work performed in the county.

The county surveyor-engineer, therefore, has a dual role. His private firm performs surveying and engineering work under contract to the county, principally in connection with the construction and maintenance of roads. He also serves in an official and appointive capacity to review a variety of permit and license applications under a number of state statutes and county ordinances. In light of these facts, Mr. Maloney asks:

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(1) Does the county surveyor-engineer have a conflict of interest when he performs engineering work for the County Roads Department pursuant to contract?

(2) Does the county surveyor's review and certification of survey maps pursuant to Sections 8766 and 8767 of the Business and Professions Code constitute a ministerial action?

(3) Can the county surveyor make decisions on land levelling and drainage permits in cases where information submitted in applications for the permits has been prepared by persons employed by the county surveyor's private firm?

(4) Can the county surveyor act despite a conflict of interest because his participation is legally required for the action or decision to be made?

CONCLUSION

1. A person contracting with the county to serve as county surveyor-engineer has no conflict of interest when he performs engineering or surveying work for the county so long as he has no authority to determine the extent of the work he will perform.

2. A county surveyor's certification pursuant to Business and Professions Code Sections 8766 and 8767 constitutes a ministerial act.

3. The county surveyor may not make decisions on land levelling and drainage permits in a case where information submitted as part of the permit application has been prepared by persons employed by the county surveyor's private firm.

4. Under the facts of this case, the county surveyor or county engineer is not legally required to act.

ANALYSIS

1. The first question is whether the county surveyor-engineer violates the conflict of interest provisions of Government Code Sections 87100 and 87103^{1/} when he

^{1/} All statutory references are to the Government Code unless otherwise noted.

performs engineering work for the county pursuant to contract. Before a person is subject to the conflict of interest provisions of the Act, he must be found to be acting as a "public official" within the meaning of Section 82048. That section defines "public official" to mean "every member, officer, employee or consultant of a state or local government agency." In performing engineering and survey work for the county on a contract basis, the county surveyor-engineer is acting in none of these capacities.

The only terms in Section 82048 that might arguably apply to this situation are "consultant" and "employee." Our regulation defining the term "consultant," however, excludes a person who does no more than provide advice, information, recommendation or counsel to an agency and whose advice is provided independent of the agency's control or discretion. 2 Cal. Adm. Code Section 18700(a)(2). The preparation of surveys and engineering studies would appear to fall within this exclusion. When performing these services, the county surveyor-engineer is not involved in any official decision making. He is merely carrying out the terms of a contract just as any vendor of goods or services to the county might. He is not subject to the control or discretion of the county when he performs his work, but is governed only by the provisions of his contract.

Nor is this a normal employer-employee relationship. The county surveyor-engineer is not eligible for workmen's compensation or other typical employee benefits by virtue of his contractual relationship with the county. In addition, the fact that his work is not subject to the control of the county suggests he is acting more in the role of an independent contractor than an employee. See Tieberg v. Unemployment Ins. App. Bd., 2 Cal. 3d 943 (1970). Thus, the county surveyor-engineer is not a public official within the meaning of the Act when his firm performs engineering and surveying work for the county. Participation in these activities does not subject him, therefore, to the disqualification provisions of Sections 87100 and 87103.

Our answer to this question assumes that in his role as county surveyor, the contractor has no say in determining the extent of the contract work he and his firm will perform for the county. It is our understanding that the contractor has no such say. If, in his role as county surveyor, the contractor could determine the extent of contract work for his private firm, there would be a conflict of interest requiring disqualification. See answer to question 3, infra.

In his official role as a regulator and reviewer of permit applications, on the other hand, the surveyor-engineer is acting as a county officer. The remaining questions ask if disqualification is required when he makes certain decisions in that capacity.

2. We are asked, first, whether the county surveyor-engineer must disqualify himself when he reviews survey maps pursuant to Business and Professions Code Sections 8762-8770. Prior to recordation, survey maps must be examined and certified by the county surveyor. Business and Professions Code Section 8766 requires the county surveyor to check the accuracy and completeness of the data required to be contained in the survey; the conformance of the survey with other records; and general compliance with the Land Surveyors Act. The surveyor cannot require changes in the survey; he can only suggest that changes be made. If the submitter of the survey rejects the suggested changes, they must be noted on the survey, but the survey must be recorded. Business and Professions Code Sections 8767-68.

If the county surveyor's review of the record of survey is a ministerial act, the surveyor would not be required to disqualify himself from that review even if there were a conflict of interest. 2 Cal. Adm. Code Section 18700(d)(1). Ministerial acts are ones where, under statute, an officer is required to act upon the happening of statutorily prescribed contingencies or events. Drumney v. State Bd. of Funeral Directors, 13 Cal. 2d 75 (1939). Once the facts evidencing the prescribed contingencies have been found to be true, the officer has no discretion to refuse to follow the mandate of the statute to act.

In the case of a record of survey, the county surveyor must certify it and present it to the recorder for recording if he finds that the contingencies set out in Business and Professions Code Section 8766 are met. If these contingencies are met, the county surveyor has no discretionary authority to disapprove the survey. Therefore, the actions of the surveyor in reviewing record of survey maps must be considered ministerial.

3. The second situation involves county surveyor decisions on land levelling and drainage permits pursuant to the Glenn County Code. The county surveyor is empowered by Glenn County Code Section 16.16.060 to issue grading permits only if:

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... the proposed work will not result in violating existing laws, will not jeopardize public property or improvements and will not endanger the public health, safety, convenience and general welfare.

Unlike the record of survey review, the grading permit decisions involve a broad exercise of discretion, and the county surveyor would have to disqualify himself from any decision in which he has a conflict of interest. The Act provides that a conflict of interest is sufficient to require disqualification if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on, among other things, a business entity in which the official has an investment of \$1,000 or more or a source of income of \$250 or more. Sections 87100 and 87103. In the case at hand, we are asked whether the county surveyor-engineer may act to approve land levelling and drainage permits for a job where his private firm has contracted to provide surveying services. We conclude that he may not.

In deciding upon applications for permits, the county surveyor has discretion, under Glenn County Code Section 16.16.040, to determine what information must accompany the application. The information he may require includes topographical plats and maps which would require the employment of a surveying crew for preparation. Thus, the decision the county surveyor makes in his official capacity could have a direct and immediate effect on the amount of work his private firm performs in connection with this permit application, and therefore, the amount of income it receives. The obvious potential for bias in this situation impels us to conclude that it is reasonably foreseeable that the effect of this decision will be material to the county surveyor's firm,^{2/} and that disqualification is required.

4. Because Glenn County has no desire or need to employ a full time surveyor-engineer, the part time employment of a county surveyor-engineer on a contract basis will create

2/ We have provided that the materiality required to trigger disqualifications exists if:

... at the time the official makes, participates in making or attempts to use his or her official position to influence the making of the decision, in light of all the circumstances and facts known at the time of the decision, the official knows or has reason to know that the existence of the financial interest might interfere with the official's performance of his or her duties in an impartial manner free from bias.

conflict of interest problems so long as the surveyor or engineer employed also has a significant private practice in Glenn County. Therefore, we are asked whether the making of decisions by the county surveyor-engineer in cases where he would be otherwise disqualified is legally required for action to be taken because, as a practical matter, there is no Glenn County engineer or surveyor who could act as part time county surveyor-engineer without conflicts arising.

Section 87101 allows an officer to act in cases in which he has a financial interest if his participation is "legally required for the ... decision to be made." This section provides a means of avoiding a paralysis of government in situations where conflicts of interest would otherwise disqualify the incumbent officer from acting. We have clarified what constitutes legally required participation in 2 Cal. Adm. Code Section 18701(a), which provides:

A public official is not legally required to make or to participate in the making of a governmental decision within the meaning of Government Code Section 87101 unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision.

This regulation reflects our conclusion that "legally required participation" is the statutory analogue to the common law "rule of necessity" recognized by the California courts.^{3/}

The "rule of necessity" is a narrow exception to the requirement that a public official disqualify himself from participation in decisions in which he has a financial interest. As expressed by the California Supreme Court, quoting from 42 American Jurisprudence 312:

There is an exception, based upon necessity, to the rule of disqualification of an administrative officer. An officer, otherwise disqualified, may still act, if his failure to act would necessarily result in a failure of justice.

Caminetti v. Pacific Mut.
Life Ins. Co., 22 Cal. 2d
344, 366 (1943).

^{3/} We note that the Attorney General has reached the same conclusion, ruling that Section 87101 is "applicable only to the isolated situation where a public official is required to act of necessity...." 58 Ops. Cal. Atty. Gen. 670, 675 (CV 75/92, Sept. 18, 1975). We also observe that although "legally required participation" and the "rule of necessity" are analogous, they are not necessarily equivalent concepts. It is not necessary to determine here whether the two doctrines require the same outcome in every case.

In Caminetti, the Supreme Court applied the rule to permit an insurance commissioner to act despite a conflict of interest because no other officer was statutorily authorized to make the decision which created the conflict. In other words, no alternative source of decision existed.

The courts have recognized, however, that where an alternative source of decision is available, the rule of necessity is not applicable. Thus, in Jeffery v. City of Salinas, 232 Cal. App. 2d 29 (1965), the court contrasted the situation of a city councilman who was permitted to vote on the creation of a parking district because of the rule of necessity and that of a special attorney who committed a "flagrant violation of legal ethics" by preparing and supervising proceedings relative to the creation of an assessment district in which he owned property. See Safeway Stores, Inc. v. City of Burlingame, 170 Cal. App. 2d 637 (1959). The court pointed out that:

... the rule that a councilman interested in property within a proposed district is not disqualified from acting in the formation of the district is one of necessity. There is no one to take his place on the council if he were thereby disqualified. As to special attorneys, the rule would not necessarily apply. The council is not required to employ any particular attorney.^{4/}

Jeffery v. City of Salinas,
232 Cal. App. 2d at 40

Similarly, in this case there is nothing in state law or county ordinance that dictates that only the incumbent surveyor-engineer contractor may act. Another person may be appointed to act in his stead in those instances where he has a conflict of interest. Even in those cases where all Glenn County qualified engineers or surveyors are disabled from acting because of conflicts, there is no need to apply the "legally required participation" doctrine. It appears likely that it would be a relatively simple matter to find a qualified surveyor or engineer from an adjoining county to provide the services which the Glenn County engineers and surveyors cannot provide because of disqualification. We understand

^{4/} Although we concur in the court's remarks about the special attorney, we intimate no opinion relative to whether a councilman would be permitted to participate based on the concept of legally required participation under the circumstances alluded to in Jeffery. See n.3, supra.

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that there are at least fifteen surveyors and engineers doing business in adjoining Butte County and, given the fact that the Glenn County engineers and surveyors perform 95% of the work done in Glenn County, it is probable that a number of those Butte County engineers and surveyors could serve Glenn County without a conflict arising.

Admittedly, use of this alternative works some hardship on the county. We do not think, however, that the concept of legally required participation was included in the Political Reform Act merely to alleviate the additional costs and inconvenience associated with seeking an available alternative source of decision. We think Section 87101's application is limited to those situations where no alternative source of decision exists and a failure to make a decision will result in "a failure of justice." Caminetti v. Pacific Mut. Life Ins. Co., supra. We conclude, therefore, that the county surveyor-engineer is not "legally required" to act in situations where he has a disqualifying conflict of interest.

Approved by the Commission on August 28, 1977.
Concurring: Lapan, Lowenstein, McAndrews and Quinn. Commissioner Remcho was absent.


Daniel H. Lowenstein
Chairman

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